(2)

Supreme Court, U.S.
FILED
JUN 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1685

In the Supreme Court of the United States

October Term, 1988

National Labor Relations Board, *Petitioner*

v.

Curtin Matheson Scientific, Inc., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

---

Brief for Curtin Matheson Scientific, Inc. in Opposition

James V. Carroll, III, Esq.*
Andrews & Kurth
Attorneys for Respondent, Curtin Matheson Scientific, Inc.
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

Of Counsel:

Holly H. Williamson, Esq.
Andrews & Kurth
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

* *Counsel of Record*

30pp

I.

QUESTION PRESENTED

Whether the Board's decision that respondent lacked a reasonably grounded good faith doubt that the Union no longer represented a majority of the respondent's employees is supported by substantial evidence in the record when considered as a whole.

II.

LIST OF AFFILIATED COMPANIES

Divisions, Subsidiaries and Parent Company of Curtin Matheson Scientific, Inc.

Divisions

J&W Scientific
Labcraft
Pacific Hemostasis

Subsidiaries

Biochemical Sciences, Inc.
Curtin Matheson Scientific (Austin) Inc. (Inactive)
United Diagnostics, Inc.

Parent Company

SciMed International, Incorporated (Parent Company: Fisons p.l.c.)

III.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement	2
Reasons Why The Petition Should Be Denied	8
The Question Presented By The Board Will Not Be Reached By The Court	8
a. The Undisputed Legal Principles Support The Company's Contention	9
b. The Company Drew Permissible Inferences From Solid Evidence	11
Conclusion	20

IV.
TABLE OF AUTHORITIES

Cases:	Page
Bickerstaff Clay Products Co., Inc. v. NLRB, 871 F.2d 980 (11th Cir. 1989)	8, 10, 11, 12, 13, 18, 19, 20, 21
Brooks v. NLRB, 348 U.S. 96, 75 S.Ct. 176 (1954)	10
Brown Transport Corp. v. Atcon, Inc., 439 U.S. 1014, 99 S.Ct. 626 (1978)	23
Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51, 284 N.L.R.B. No. 113, (July 27, 1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed Mar. 7, 1988)	10, 21, 23
Centre Property Management v. NLRB, 807 F.2d 1264 (5th Cir. 1987)	22
Dalewood Rehabilitation Hospital, Inc. v. NLRB, 566 F.2d 77 (9th Cir. 1977)	11
Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S.Ct. 2225 (1987)	9
Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000, 96 S.Ct. 433 (1975)	23

	Page
Hajoca Corp. v. NLRB, 872 F.2d 1169 (3d Cir. 1989)	23
J & J Drainage Products Co., 269 N.L.R.B. 1163 (1984)	13
J. Ray McDermott & Co. v. NLRB, 571 F.2d 850 (5th Cir. 1978), *cert denied*, 439 U.S. 893, 99 S. Ct. 250 (1978)	10
Lodges 1746 and 743, International Association of Machinists v. NLRB 416 F.2d 809 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058, 90 S.Ct. 751 (1970)	13
NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978)	11, 12, 13
Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456 (1951)	8, 22
Statutes:	
National Labor Relations Act, 29 U.S.C. 151 *et. seq.*:	
§ 8 (a) (1), 29 U.S.C. 158 (a) (1)	6
§ 8 (a) (5), 29 U.S.C. 158 (a) (5)	6, 7
Secondary Authority:	
R. Gorman, Labor Law (1976)	8, 9, 23

In the Supreme Court of the United States

October Term, 1988

No. 88-1685

National Labor Relations Board, *Petitioner*

v.

Curtin Matheson Scientific, Inc., *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR CURTIN MATHESON SCIENTIFIC, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a-24a) is reported at 859 F.2d 362 (1988). The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) is reported at 287 N.L.R.B. No. 35 (Dec. 16, 1987). The decision and order of Administrative Law Judge Martin S. Bennett is included as Pet. App. 46a-54a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on November 4, 1988. (Pet. App. 55a) A petition for rehearing was denied on December 22, 1988. (Pet. App. 56a-57a) Pursuant to an extension of time granted by Justice White, the petition for a writ of certiorari was filed on April 17, 1989. Pursuant to the grant of another extension, the time within which to file respondent's brief in opposition to the petition for a writ of certiorari was extended to and including June 5, 1989. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant portions of the National Labor Relations Act, as amended, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2.

STATEMENT

On April 15, 1970, the General Drivers, Warehousemen and Helpers, Local 968, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union") was certified as the exclusive collective bargaining

representative of all production and maintenance employees of Curtin Matheson Scientific, Inc. (the "Company"). (Pet. App. 2a, 51a) During the following nine years, the Union and the Company entered into successive collective bargaining agreements, the latest of which expired on May 21, 1979. (Pet. App. 2a, 26a, 51a) On May 25, 1979, during negotiations for a new contract, the Company made its last contract offer, which was rejected by the Union on May 29, 1979. (Pet. App. 3a, 26a)

On June 4, 1979, the employer lawfully locked out all bargaining unit employees in support of its bargaining position. (Pet. App. 3a, 26a) When the parties met again on June 12, 1979, the Company renewed its last contract offer of May 25, 1979 and notified the Union that the lockout was terminated effective that date. (Pet. App. 3a, 26a-27a, 49a) The Union, however, rejected the Company's renewed contract offer, and went on strike June 13, 1979. (Pet. App. 3a, 27a, 49a) Five of the twenty-seven bargaining unit employees immediately crossed the picket line and returned to work. (Pet. App. 3a, 27a, 49a)

On June 25, 1979, while the strike was still in progress, the Company hired twenty-nine replacements, thus replacing permanently all twenty-two employees who remained on strike. (Pet. App. 3a, 29a-30a, 50a) The seven extra replacements were hired because the replacements lacked experience and some immediate turnover was expected. (Pet. App. 3a, 30a & n.9, 50a)

From the beginning of the strike, the Union suffered from a lack of enthusiasm for and interest in the strike among the employees. Indeed, the Union itself showed a surprising general apathy towards the strike and its striking members. (Pet. App. 6a-8a, 27a-30a, 49a-50a) Within a matter of weeks, it had become obvious that the Union had lost majority support among the employees. For that reason, despite the Union's notification to the Company on July 16th that it wished to accept the Company's May 25th offer, the Company on July 20th, withdrew recognition from the Union. (Pet. App. 3a, 29a, 30a, 52a) On July 20, 1979 there remained forty-nine employees in the bargaining unit, including nineteen

strikers, five cross-overs, and twenty-five replacements. (Pet. App. 3a) Of the original twenty-seven employees, a full 14.8% had voiced an intent to resign, retire, or withdraw,[1] apparently out of a desire to have nothing further to do with the Union. (Pet. App. 7a, 8a, 29a, 32a, 53a) Including the five employees who refused to participate in the strike, the total announced defections from and rejections of the Union amounted to 33% of the original workforce.

On July 20, 1979, the Union requested that the Company furnish to it the total number of bargaining unit employees currently on its payroll; the job classification of each bargaining unit employee; and the seniority date of each bargaining unit employee. Because of its good faith doubt, the Company refused to furnish this information to the Union. (Pet. App. 3a-4a, 30a-31a, 48a)

1. Striker and Union leader, Shady Goodson, resigned on July 19, 1979. (Pet. App. 53a) Another striker, Robbie Madison, resigned on July 20, 1979. (Pet. App. 53a) Striker, Raymond Brunner, tendered his notice of early retirement. (Pet. App. 53a) Clint Waller, another striker, tendered his written notice of withdrawal from the Union. (Pet. App. 53a)

In due course, the Union filed a charge with the Board alleging that the Company had engaged in unfair labor practices within the meaning of sections 8 (a) (5) and 8 (a) (1) of the Act.[2] The Board issued a complaint against the Company on September 7, 1979, and the matter was heard by Administrative Law Judge ("ALJ") Martin S. Bennett on June 10, 1980. (Pet. App. 4a, 47a)

ALJ Bennett issued his decision on November 20, 1980, determining that the Company had entertained a reasonably grounded good faith doubt as to the Union's majority when recognition was withdrawn. (Pet. App. 53a-54a) Accordingly, ALJ Bennett recommended dismissal of the complaint in its entirety. (Pet. App. 54a) The General Counsel for the Board filed exceptions and a supporting brief and the Company filed a brief opposing the General Counsel's exceptions. The record and decision were then transferred to the Board.

2. None of the Company's actions in bargaining, locking out the employees, or hiring and retaining permanent replacements for the strikers has ever been challenged or found to be improper. Only the Company's withdrawal of recognition and subsequent refusal to deal with the Union is in question.

Inexplicably, seven years passed before the Board, on December 16, 1987, finally issued its decision and order declaring that the Company had violated sections 8 (a) (5) and 8 (a) (1) of the Act. The Board ordered the Company to cease the unfair labor practices and to take certain affirmative action to effectuate the policies of the Act. (Pet. App. 26a, 40a-43a)

The Company thereafter filed its petition for review with the United States Court of Appeals for the Fifth Circuit requesting that the Board's decision and order be set aside in its entirety. The Fifth Circuit granted the Company's request, finding that the Company had lawfully withdrawn recognition due to the Company's good faith doubt concerning the Union's continuing majority support. Consequently, the Fifth Circuit reversed the Board's decision and denied enforcement of its order. (Pet. App. 1a)

The Board now seeks review of the Fifth Circuit's decision by petitioning this Court for a writ of certiorari.

For the reasons set forth in the discussion that follows, the Company opposes the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

The Question Presented By The Board Will Not Be Reached By The Court.

Should the Board's Petition be granted, the Court will be faced with only one question: whether the Board's decision that the Company lacked a reasonably grounded good faith doubt of continuing majority support was supported by substantial evidence in the record. To answer this question the Court will be required to review the record in its entirety and consider *all* of the factors known to and weighed by the Company when it questioned the Union's majority support. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 465 (1951); Bickerstaff Clay Products Co., Inc. v. NLRB, 871 F.2d 980, 984 (11th Cir. 1989). Among those factors considered by the Company, but by no means the sole factor, was the hiring of striker replacements. Despite the emphasis that has been placed by the Board upon the replacements' presumed anti-union sentiments (the "Gorman

presumption"), other objective considerations existed which, even absent reliance upon the Gorman presumption, served to create a reasonable doubt of continuing majority support. Consequently, even if the Court grants the Board's petition for a writ of certiorari, this case may be decided without ever reaching the question presented by the Board.

a. The Undisputed Legal Principles Support The Company's Contention.

It long has been recognized that following the expiration of a union's certification year, the irrebuttable presumption of continuing union majority support becomes a rebuttable presumption. *E.g.*, Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37, 107 S.Ct. 2225, 2233 (1987). (Pet. App. 32a) As the Board acknowledges, following the expiration of the certification year, an employer may rebut the presumption of majority support and lawfully withdraw recognition by showing either: (1) a majority of the bargaining unit employees, in fact, no longer wish the union to represent them; or (2) the employer has a reasonably grounded good faith doubt concerning the Union's continued majority support among

bargaining unit employees. (Pet. App. 32a) Brooks v. NLRB, 348 U.S. 96, 104, 75 S.Ct. 176, 182 (1954) (approving the policy that an employer "with fair doubts about the union's continuing majority, [ ] may refuse to bargain further with it."); J. Ray McDermott & Co. v. NLRB, 571 F.2d 850, 858 (5th Cir. 1978), *cert. denied*, 439 U.S. 893, 99 S. Ct. 250 (1978); Buckley Broadcasting Corp. of California d/b/a Station KKHI & National Association of Broadcast Employees & Technicians, Local 51, 284 N.L.R.B. No. 113, slip op. at 4 (July 27, 1987), *application for enforcement pending*, No. 88-7106 (9th Cir. filed Mar. 7, 1988) (hereafter, "Station KKHI").[3]

---

3. Despite the fact that the two standards are independent of one another, the Board impermissibly blurs the distinction between the two and demands that the Company be held to the first and more rigorous standard. Thus, the Board would have the Company prove conclusively for each of twenty-five members (51%) of the total workforce remaining on July 20, 1979 that each did not support the Union. (Pet. App. 32a, 34a, and 35a) With this attempt, the Board *has failed and refused to follow its own mandate* in assessing the reasonableness of an employer's withdrawal of recognition. Station KKHI, 284 N.L.R.B. No. 113, slip op. at 4 (July 27, 1987). It clearly is improper for the Board to require the Company to prove that each piece of evidence, in isolation, supports the Company's claim of good faith doubt. And it equally is impermissible for the Board to require proof that each individual comprising the majority was antiunion. Bickerstaff, 871 F.2d at 994 ("the Board has erroneously looked at each piece of evidence in isolation, instead of looking at the totality of factors presented by the Company."); (footnote continued)

b. The Company Drew Permissible Inferences From Solid Evidence.[4]

In arriving at its good faith doubt of the Union's majority status, the Company drew permissible inferences from solid evidence. Bickerstaff, 871 F.2d at 994; NLRB v. Randle-Eastern Ambulance Service, Inc., 584 F.2d 720, 729 (5th Cir. 1978). All of the factors presented by and relied upon the Company, when considered together, supported its good faith doubt. These factors included:

(1) Strike Nonparticipation. From the very beginning, the employees showed a surprising lack of interest in, and enthusiasm for, the strike. Evidence of this nonsupport included the fact that five, or 18.5%, of the unit's twenty-seven employees wholly refused to join the strike and immediately crossed the picket line and

(footnote continued) Dalewood Rehabilitation Hosp., Inc. v. NLRB, 566 F.2d 77, 79-80 (9th Cir. 1977) ("[e]ven when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate."). As determined by ALJ Bennett, the Company had a "reasonably based good faith doubt of the Union's majority status [and thus satisfied the second, less rigorous test used to overcome the presumption of continuing Union majority]." (Pet. App. 53a-54a)

4. The quoted conversations and summaries of conversations contained in the discussion that follows are supported in the record.

thereafter reported to work each day. (Pet. App. 52a) While the fact that an employee who crosses a picket line and reports to work does not, in and of itself, conclusively establish repudiation of the union, a refusal to join the strike is a factor that an employer necessarily and justifiably would consider in reasonably evaluating whether it had a good faith basis for doubting the Union's majority support. Bickerstaff, 871 F.2d at 985-86, 988-89; Randle-Eastern, 584 F.2d at 728. To be sure, the Company had every reason to believe these employees rejected the union when two of the non-strikers, Tony Lopez and Bill Lee, volunteered to management their antiunion sentiments.

Mr. Lopez, on two separate occasions, initiated conversations with management for the purpose of voicing his strong dissatisfaction with the Union. He informed Company personnel that he believed the payment of union dues was a waste, and that he would not pay. (Pet. App. 7a, 27a, 49a) Bill Lee also initiated conversations with management and said "he was not paying dues to the Union and he didn't intend to, and he didn't think that

they [the Union] had done anything for the employees." (Pet. App. 7a, 27a, 49a)

The Union's Chief Shop Steward and member of the Union Negotiating Committee, Shady Goodson, also contacted Company management and volunteered that he was having difficulty manning the picket line, developing the picket roster, and getting help from the union.[5] (Pet. App. 7a, 28a, 52a, 53a) And when striker, Clint Waller, contacted management, he stated that he was not manning

5. The Board attempts to discount and undermine the significance of Mr. Goodson's statements by stressing that Mr. Goodson commenced this discussion by saying that he was acting on his own behalf. (Pet. App. at 28a n.6) But the Board misses the point. Because Mr. Goodson was actively involved in the affairs of the union as its Chief Steward and was a member of the negotiating committee, he was, in fact, an agent of the Union, and was fully aware of the attitudes of the striking employees. Consequently, his representations are entitled to significant weight in the assessment of the Company's good faith doubt of the Union's continuing majority, even if he said he was speaking on his own behalf. Randle-Eastern, 584 F.2d at 729 ("employer may rely on a Union officer's admission that the Union has lost majority support as objective evidence to support a good faith doubt."); Lodges 1746 and 743, Int'l Ass'n of Machinists v. NLRB, 416 F.2d 809, 812-13 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058, 90 S.Ct. 751 (1970) (admission of lack of majority support which was not ever made directly to employer was important factor constituting a reasonable basis for doubt); J & J Drainage Prod. Co., 269 N.L.R.B. 1163, 1171 (1984) (statement by one of two union stewards in relatively small unit that employees were not interested in union should be accorded greater weight than comments by other employees); *see also* Bickerstaff, 871 F.2d at 987 & n.7.

the picket line, nor would he man it in the future. (Pet. App. 8a)

Striker, Raymond Brunner, complained that the strike was unnecessary and was the Union's fault. (Pet. App. 8a, 29a, 53a)

(2) Rejection Of And Disillusionment With The Union. Contributing to the Company's beliefs of waning Union support were the employees' expressions of distrust and dissatisfaction with, as well as outright rejection of, the Union. In this regard, in the volunteered disclosures made by employees Tony Lopez and Bill Lee, both stated that they did not intend to pay union dues. Lee further elaborated that he "didn't support the Union." (Pet. App. 7a, 27a, 49a)

Chief Shop Steward, Shady Goodson, reported to the Company that he "felt like they [the employees] were paying for their [Union] dues and not getting anything for it." He indicated that strikers J. R. Blackshire and Pete Doucette had expressed the same concern as he "that the Union wasn't really supporting the people." (Pet. App. 28a, 52a)

Former Shop Steward J. R. Blackshire crossed the picket line to discuss with management the lack of Union support shown by the employees and the fact that he could not support the Union because it had failed to support its members. After meeting with some of the employees who had returned to work, Mr. Blackshire again initiated a conversation with management in which he stated that the Union "had lost all their support from the employees in the unit" and that there were "many others who wanted to come back to work and didn't want the Union to represent them anymore."[6] (Pet. App. 7a-8a, 28a, 53a)

6. Again, the Board has attempted to discount the significance of the antiunion sentiments expressed by an employee. (Pet. App. 35a n.12) Rejecting Mr. Blackshire's representations that he was expressing the view of employees other than himself, the Board assigned little weight to his comments because he used the expression "the people" instead of "bargaining unit employees." Such nit picking proves that the Board applied an impermissible standard in this case. It is only *reasonable doubt* that the Company must demonstrate, not proof positive. *See supra*, n.3. Moreover, the cases the Board relied upon for the proposition that crediting such statements would mean "a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority" (Pet. App. 35a n.12) are distinguishable from the instant case. None of those cases involved total replacement of strikers and other compelling evidence present in this record. Mr. Blackshire's involvement in the leadership of the Union had been more than that of an average employee; thus there was an additional basis for employees to express to him their Union sentiments. The Company and ALJ thus were justified in placing significant weight on his statements. *See infra* n.9.

Striker Raymond Brunner, made a written request for early retirement rather than continue to be associated with the Union. He said that he came to the decision to retire because he didn't want to work with the Union people again. (Pet. App. 8a, 29a, 53a) And Clint Waller, another striker, reiterated several times during the course of a meeting with management, his opinion that the Union was not representing the employees. Mr. Waller confirmed his dissatisfaction when he sent letters to both the Company and the Union stating "I wish not to be a member of the Teamsters no longer at Curtin Matheson Scientific, Inc. *or anywhere else.*" (Pet. App. 53a) (emphasis added)

Even striker replacement, David Schneider, volunteered to management that the Union did not support the employees. (Pet. App. 53a)

(3) Resignations, Withdrawals, And Requests For Reinstatements. The Company's doubts as to the Union's majority support was further reinforced when, prior to the Company's announcement that it had withdrawn recognition from the union, Raymond Brunner tendered his written request for early retirement, citing his

aversion to the Union as the reason for the request. (Pet. App. 8a, 29a, 53a) Moreover, after the Union notified the Company that the Union had decided to accept the offer it had rejected previously, but before the Company announced its doubts concerning the Union's continuing majority status, *two* former strikers tendered their resignations; the first was Shady Goodson, the Chief Shop Steward and Union Negotiating Committee member who previously had informed management of his and other employees' disillusionment with the Union. (Pet. App. 7a, 28a, 53a) On the day following Mr. Goodson's resignation, another former striker, Robbie Madison, tendered his resignation. (Pet. App. 30a, 53a)

During one of Mr. Blackshire's meetings with management, the former steward made a written request for reinstatement. Earlier, Mr. Blackshire had informed the Company that there were "many others [strikers] who wanted to come back to work and didn't want the Union to represent them anymore." (Pet. App. 7a-8a, 28a, 53a)

(4) Union Dormancy. Other than one piece of correspondence, which was unrelated to the strike or negotiations, the Union made no attempt to communicate

with the Company from June 12, 1979 until July 16, 1979, when the Union notified the Company of its desire to accept the contract it previously had rejected. (*See* Pet. App. 3a) Moreover, there is no evidence that, after they were employed on June 25th, the Union ever attempted to contact the striker replacements to solicit their support for the Union or the strike. There also is no evidence that the replacements attempted to contact the Union.[7] (Pet. App. 30a) Given the succession of events that transpired between June 13th and July 20, 1979, the Union's inactivity was a significant factor considered by the Company in arriving at its reasonable doubt as to the continuing majority support. Bickerstaff, 871 F.2d at 986, 992-93. The Union's inactivity was particularly significant in light of the employees' lack of enthusiasm for the strike, their vocal disenchantment with, and distrust

---

7. It was not until July 20th (almost one month after they were hired), that the Union asked the Company for information about the replacements; i.e., the number of such employees, their job classifications and seniority dates. By this time, the Company had withdrawn recognition. The belated inquiries by the Union reveal the hollowness of its "interest," if any, in the replacements and its absolute lack of information from other sources about them.

of, the Union, and the complete replacement of the strikers on June 25th. Id.

(5) Loss Of Confidence In The Union Leadership. In their meetings with Company personnel, the employees wasted no time in maligning Howard Reed, the Union's Business Agent, and accusing him of creating a strike unneeded and unsupported by the employees. For example, Tony Lopez stated that Mr. Reed was not doing his job in representing the employees and in fact called Mr. Reed a "rotten S.O.B. that is screwing the employees, taking their money, and doing nothing for us." (*See* Pet. App. 49a) The Chief Shop Steward and member of the Union Negotiating Committee, Shady Goodson, shared some of Mr. Lopez's opinions about Mr. Reed, noting that it was Mr. Reed who wanted the strike, not the employees. According to Mr. Goodson, the strike served to feed a personal vendetta on the part of Mr. Reed rather than serve the interests of the employees. (*See* Pet. App. 49a, 52a)

(6) Striker Replacements. *One* of the factors, but NOT the only factor, considered by the Company when it arrived at its belief that the Union no longer enjoyed

majority status, was the hiring of a new workforce of striker replacements. (Pet. App. 6a)

CONCLUSION

As opposed to other cases which likely will be placed before this Court for review and which contain facts more amenable to a direct and clear resolution of the question presented by the Board, the outcome of this case turns on more than just the issue of the Union sentiments of striker replacements.[8]

Indeed, the facts presented in this case are closely analogous to those addressed by the Eleventh Circuit in Bickerstaff Clay Products, Inc. v. NLRB, 871 F.2d 980 (11th Cir. 1989). In Bickerstaff, as in the instant case, the combination of a number of different factors lead to the employer's belief that the Union had lost its majority support. And while the Eleventh Circuit accepted the

8. If the Petition is granted, the Company will contend that the hiring of a new workforce is evidence upon which a good faith doubt may be grounded and that the Fifth Circuit's decision herein was proper. However, the Company will also contend that the Board impermissibly has blurred the distinction between the two standards for rebutting the presumption of continued majority support (*see supra* n.3) and has improperly trivialized and disregarded the other evidence supporting the Company's good faith doubt which was relied upon by the ALJ and the Fifth Circuit. *See supra* nn.5 & 6, & *infra* n.9.

Board's Station KKHI theory regarding striker replacements, that issue was not dispositive of the case. Rather *all* of the factors relied upon by the employer, when considered together, sustained the employer's good faith doubt. For example, in Bickerstaff, as in the instant case, a high percentage of the total collective bargaining unit refused to participate in the strike. There was evidence of Union inactivity, breakdown in Union leadership, resignations or withdrawals from the Union, employee disillusionment with the Union, and the employer's decision to hire permanent replacements. Id. at 985-88. The Eleventh Circuit weighed and considered *all* of the factors and concluded that the combined factors gave the employer a reasonably based good faith doubt of the Union's continuing majority status. Id. at 994.

Consequently, the Union sentiments of the strikers were not critical to the outcome of the case.[9]

While the Company fully appreciates the Board's interest in having the question of striker replacements' sentiments heard now, as opposed to later, this is not the case that adequately lends itself to a resolution of the Board's question. For even if the writ of certiorari is granted, *all* of the factors considered by the Company will control the outcome -- not presumptions concerning striker replacement sentiments.

The resolution of any inconsistencies that may exist among the courts of appeals as regards the questions of presumptions concerning striker replacements' union

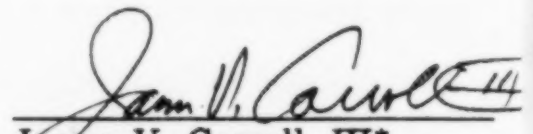
---

9. Likewise, the ALJ's decision herein did not rest upon a presumption concerning the antiunion sentiments of striker replacements. Rather, the ALJ assessed all of the evidence and found that it supported a good faith doubt. "[S]pecial deference must be paid to the ALJ's conclusion" where resolution of a case depends to a large degree upon assessment of the witnesses' credibility. Centre Property Management v. NLRB, 807 F.2d 1264, 1268 (5th Cir. 1987); Universal Camera, 340 U.S. at 496-497, 71 S.Ct. at 469 ("evidence may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's. . . .")

sentiments, is best left to a case in which the issue can be addressed clearly and directly.[10]

For this reason, review of this case by the Court is not warranted and the petition for a writ of certiorari should be denied.

Respectfully submitted,



James V. Carroll, III*
ANDREWS & KURTH
4200 Texas Commerce Tower
Houston, Texas 77002
(713) 220-4200

Of Counsel:
Holly H. Williamson, Esq.
Andrews & Kurth

Attorneys for Respondent
Curtin Matheson
Scientific, Inc.

* Counsel of Record

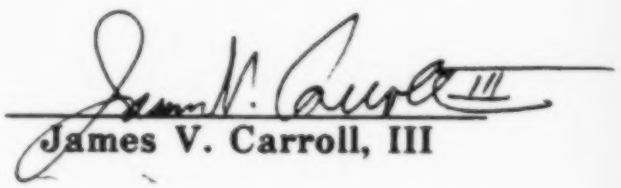
10. *See, e.g.*, Hajoca Corp. v. NLRB, 872 F.2d 1169 (3d Cir. 1989); Station KKHI, 284 N.L.R.B. No. 113, *application for enforcement pending*, No. 88-7106 (9th Cir. filed Mar. 7, 1988). The mere fact that the courts of appeals have inconsistently resolved similar issues does not make a case certworthy. *See generally, e.g.*, Brown Transp. Corp. v. Atcon, Inc., 439 U.S. 1014, 99 S.Ct. 626 (1978); Greco v. Orange Memorial Hosp. Corp., 423 U.S. 1000, 96 S.Ct. 433 (1975). And while the Company acknowledges that when assessing the reasonableness of an employer's belief that a union has lost majority support, the courts of appeals, under a variety of different scenarios, have adopted different measures to ascertain the reasonableness of the employer's doubt, the Company stresses that the Fifth Circuit's adoption of the Gorman presumption does not change the outcome of this case.

PROOF OF SERVICE

James V. Carroll, III, Andrews & Kurth, deposes and states that pursuant to Rule 28.3 of this Court he served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

William C. Bryson
Acting Solicitor General
Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D. C. 20530

and depositing the same in the United States mail at Houston, Texas on the *5th* day of *June, 1989*.



James V. Carroll, III